IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 714, 768, 769, and 776

OCEAN DRILLING & EXPLORATION COMPANY, J. R. FRANKEL, ET AL., J. RAY MCDERMOTT & CO., INC., THE SUPERIOR OIL COMPANY, *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

QUESTION PRESENTED

Where, prior to completion of appeal proceedings challenging the Federal Power Commission's issuance of a certificate of public convenience and necessity, a natural gas producer commences service under the certificate, which later is held invalid on the ground that the initial price thereunder is out of line, does the Commission, on remand, have power to require refunds of the excess amounts collected by the producer under the invalid certificate?

STATEMENT

By orders issued September 4, 1958 and August 10, 1959, the Federal Power Commission, over the objection of the Public Service Commission of the State of New York and other consumer interests, granted unconditional certificates to a substantial number of natural gas producers, including the four petitioners here, authorizing them to commence the sale of natural gas from Louisiana fields at initial prices ranging from 21.4¢ to 23.8¢ per Mcf. On appeal, the Commission's actions were reversed and the several cases remanded.[1]

In the meantime, however, and notwithstanding the pendency of the appeals, the present petitioners commenced service under the unconditional certificates and collected the high initial price that was the basis for the legal attack on, and judicial invalidation of, the certificates. Following hearings on remand, the Commission determined that the maximum initial price at which these sales should have been certificated was 20¢ per Mcf, including 1.5¢ tax reimbursement where applicable, and, to give effect to this finding, it issued new certificates at that level and directed petitioners to refund all amounts in excess of 20¢ per Mcf which had been collected under the original, judicially invalidated certificates.

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[1] *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959); *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879, 881 (1961); *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880, 882 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (10th Cir. 1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (5th Cir. 1961), *cert. denied*, 366 U.S. 965 (1961).

On appeal by petitioners and other producers, the Court of Appeals for the Fifth Circuit, though reversing other aspects of the Commission's order,[2] held that, on remand, the Commission had power to require refunds of "the fruits obtained [by petitioners] under an invalid, that is illegal, order." *Callery Properties, Inc.* v. *F.P.C.*, 335 F.2d 1004 at 1019.

ARGUMENT

Although, for the reasons stated in its own petition for a writ of certiorari (O.T. 1964, No. 678, filed November 12, 1964), the Public Service Commission of the State of New York believes that the decision below urgently requires review and, indeed, summary reversal by this Court, it does not believe that the narrow aspect of the decision below presented by petitioners in Nos. 714, 768, 769, and 776 merits certiorari.

1. The issue raised by petitioners was rightly decided below.

a. The Commission's determination to require refunds of excess amounts was eminently correct, and was, in fact, required by this Court's landmark decision in *Atlantic Refining Co.* v. *Public Service Commission of New York* (*Catco*), 360 U.S. 378 (1959), in which the Commission's unconditional certification of a 21.4¢ Louisiana sale was struck down precisely because it would permit the producers to retain, without refund obligation, an out-of-line price during the "nigh interminable" period between initial certifica-

[2] The court's action in reversing the Commission is the subject of pending petitions for certiorari in *F.P.C.* v. *Callery Properties, Inc.*, O.T. 1964, No. 756; *Public Service Commission of New York* v. *Callery Properties, Inc.*, O.T. 1964, No. 678; *United Gas Improvement Co.* v. *Callery Properties, Inc.*, O.T. 1964, No. 671.

tion and the ultimate conclusion of a rate investigation. Here, where there has been a "nigh interminable" delay of four to five years between initial, invalid certification and lawful certification on remand, the producers nevertheless urge that, as a matter of law, they cannot be required to refund the excess amounts collected during this period. Acceptance of the producer position, however, would result in "a windfall for the natural gas company and a consequent squall for the consumers," 360 U.S. at 390, thereby frustrating the

> "overriding intent of the Congress to give full protective coverage to the consumer as to price." 360 U.S. at 389.

b. Not only are refunds necessary to meet the substantive requirements of the Act, as spelled out by this Court in *Catco, supra,* but they are necessary, as a remedial measure, to carry out the purpose of the reversal of the original, unlawful certificates and to assure that the petitioners in the earlier appeals will be made whole.

c. Wholly aside from the Commission's power on remand to correct the errors laid bare by the earlier appeals, the express conditioning power conferred by Section 7(e) of the Natural Gas Act[3] provides ample authority for the Commission to condition its issuance of the new certificates upon the applicants' refunding all excess amounts collected under the invalid certificates. See *F.P.C.* v. *Hunt,* 376 U.S. 515 at 521 (1964).

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[3] "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

d. In electing to commence service at a time when the validity of their certificates was under attack, the present petitioners necessarily assumed the risk that the certificates might be rendered invalid. See *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F.2d 921 at 927 (D.C. Cir. 1958). The producer contention that the consumer representatives, the successful petitioners in the earlier appeals, either could have or should have obtained a stay of the invalid certificates pending appeal is devoid of merit; no stay was available precisely because those petitioners, if successful, could be made whole through refunds on remand, *Id.*, 259 F.2d at 925-27.

2. There is no conflict between the decision below (insofar as it sustains the Commission's power to order refunds) and the decision of any other circuit or of this Court.

Although petitioners correctly cite *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and related cases[4] for the proposition that the Commission has no power, under Section 5 of the Act, to require refunds of excess amounts collected under a rate which has assumed finality, they overlook the fact that, as noted by the Commission at the very outset of these remanded proceedings (27 FPC 482 at 483, R. 411):

> "[The] unconditional certificate orders under Section 7 were erroneously issued in the first place and as a result of the invocation of Section 19 have never assumed finality."

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[4] *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959); *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Hope Natural Gas Co.* v. *F.P.C.*, 134 F. 2d 287 (4th Cir. 1943).

Absent finality, of course, the filed-rate doctrine of *Montana-Dakota* has no applicability. See, *e.g., Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 at 249 (D.C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963 (1964);[5] *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937; *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 52 Del. 262, 155 A.2d 879 (1959).

CONCLUSION

In sustaining the Commission's power to order refunds of excess amounts, the decision below was eminently correct and presents no conflict with the decision of any other circuit. Accordingly, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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[5] The arguments now presented by Ocean Drilling, petitioner in No. 714, are virtually identical with the arguments unsuccessfully pressed by Prado Oil & Gas Co. last term. See *Prado Oil & Gas Co.* v. *F.P.C.*, O.T. 1963, No. 987, petition pp. 8-10.